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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1826

AIR LINE EMPLOYEES ASSOCIATION, INTERNATIONAL,

Petitioner,

vs.

NELSON EVANS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Air Line Employees Association, International, by its undersigned attorneys, prays that a Writ of Certiorari issue to review a judgment of the Supreme Court of Georgia.

OPINION BELOW.

The opinion of the Supreme Court of Georgia rendered on April 7, 1976, *rehearing denied*, April 20, 1976, is reported at .....So.2d ..... (not reported as of this date). A copy of the said opinion is appended hereto in accordance with Rule 23 (1)(i).

JURISDICTION.

The respondent's cause of action was based upon alleged violations of rights under a collective bargaining agreement made pursuant to the Railway Labor Act and alleged violations of rights under the Railway Labor Act. In its pleadings, and at every step of the proceedings in the trial and appellate courts, the petitioner contended that the facts as stated required the respondent to exhaust his administrative remedies before pursuing court action. The Courts below rejected this contention (Appendix A, B). Thus, the State Court has decided a federal question of substance in a way not in accord with applicable decisions of this Court. The judgment below was entered on April 7, 1976, and rehearing was denied on April 20, 1976. Jurisdiction of this Court to review is invoked by the petitioner pursuant to 28 U.S.C. 1257(3).

QUESTION PRESENTED.

Pursuant to the union security provisions of a collective bargaining agreement, the respondent airline employee was discharged at the request of the petitioner, his collective bargaining representative, by the employer for non-payment of union dues. The collective bargaining agreement contained an administrative procedure for review of such a dispute by a neutral arbitrator. The employee brought suit without utilizing the administrative relief procedure. He was subsequently reemployed and now seeks only damages from the petitioner.

Thus, the sole question presented here is whether the respondent employee should have been required to exhaust his available administrative relief prior to proceeding with this court action.

STATUTES INVOLVED.

The statutes involved in this case are the following:

Railway Labor Act, Title I, Sec. 1, 44 Stat. 577, as amended (45 U.S.C.A. 151).

Railway Labor Act, Title I, Sec. 2, First, Second, Third, Sixth, Eleventh, 44 Stat. 577, as amended (45 U.S.C.A. 152).

Railway Labor Act, Title II, Sec. 201, 202, 204 (45 U.S.C.A. 181, 182, 184).

STATEMENT.

The respondent Evans, sued the petitioner, Air Line Employees Association, International (hereinafter referred to as ALEA), and Airlift International, Inc. (hereinafter referred to as Airlift), in the Superior Court of Fulton County, Georgia, complaining of discharge by the employer, Airlift, at the request of the collective bargaining representative, ALEA, for non-payment of union dues. Evans sought reinstatement to employment and damages (actual and punitive) for wrongful discharge.

Evans alleged that until November 19, 1974, he was employed by Airlift at the Atlanta airport (amended complaint. R. p. 90, para. 3). He was a member of ALEA, a labor organization representing at Airlift the craft or class of employees to which Evans belonged (Amended Complaint, R. p. 91, para. 7, 8). Airlift is a carrier by air and, as such, is subject to and governed by the provisions of the Railway Labor Act in its relations with its employees (Amended Complaint, R. p. 91, para. 7). ALEA, representing employees of an air carrier, likewise is governed by the Railway Labor Act (Amended Complaint, R. p. 91, para. 8). Thus, this case involves the application of federal law.

When Evans was employed by Airlift, he was told by a management representative that he "would be required to join

the union." Evans agreed to join ALEA, signed a check-off authorization for his dues and was told he would have to pay an initiation fee of $58.00 (not due until after he completed his 90 day probationary period of employment) (Amended Complaint, R. pp. 92, 93, para. 13, 14).

On November 16, 1974, Evans received a copy by certified mail of a letter which is attached to the Amended Complaint as Exhibit A (R. p. 98). The letter was addressed to the Vice President of Airlift by the President of ALEA and stated that Evans has not complied with Section 23, paragraph C, of the collective bargaining agreement (this provision appears R. pp. 72, 73). Evans was terminated by Airlift on November 19, 1974 (Amended Complaint, R. p. 91, para. 6). Without resorting to the contract grievance procedure (R. pp. 72, 73), Evans filed suit on November 25, 1974 (R. p. 19), seeking injunctive relief (Amended Complaint R. pp. 95, 96), damages, actual and punitive, and attorneys' fees (Amended Complaint, R. p. 96).

Evans alleged that his termination was contrary to the collective bargaining agreement and to the Railway Labor Act:

> "Plaintiff shows that he was terminated illegally, unlawfully, and wrongfully under the Collective Bargaining Agreement and that said termination was a direct contravention of said Agreement and the Railway Labor Act, 42 [sic] U.S.C. Chapter 8." Amended Complaint, R. p. 91, para. 7.

Although Evans sought to protect rights under the collective bargaining agreement and the Railway Labor Act, he also sought to bypass the orderly procedures provided by the collective bargaining agreement and required by the Railway Labor Act and came into court without seeking to pursue or exhaust same:

> "Plaintiff is without an adequate remedy at law and seeks a temporary and permanent injunction to protect his rights under the Collective Bargaining Agreement and to retain his membership in said Union which is a condition of his employment." Amended Complaint, R. p. 92, para. 11.

Both ALEA and Airlift responded to the Amended Complaint by answer and by filing motions to dismiss (R. pp. 94, 140). The motion to dismiss of Airlift stated: 1) both defendants were organizations within the meaning of and covered by the Railway Labor Act (45 U.S.C.A. § 151, *et seq.*); 2) Count I of Evans' complaint alleged a wrongful discharge, and Count II alleged a conspiracy to effect the wrongfully discharge; 3) if the discharge was wrongful that it was subject to the compulsory arbitration processes required by the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, § 181, § 184 (incorporated into the collective bargaining agreement), which act all parties agree is applicable. Thus the failure to exhaust said remedies compelled the dismissal of the case for want of jurisdiction and for failure to state a claim (R. p. 94). ALEA's motion restated the defense of failure to state a claim principally relying upon failure to exhaust administrative remedies (R. p. 140).

In due course, the motions were set for hearing and were orally argued before the trial court. The trial judge over-ruled said motions and rendered a handwritten opinion (R. p. 146, App. A).

The defendants filed a request for immediate review pursuant to Georgia Code §6-701. The trial court agreed that the overruling of the motion to dismiss was of such importance that immediate review should be had and certified the matter on August 4, 1975 (R. p. 150).

A petition was filed in the Court of Appeals. The Court of Appeals transferred the request to the Supreme Court, and the Supreme Court granted leave to file an appeal by order dated September 3, 1975.

A notice of appeal was timely filed by both ALEA and Airlift (R. p. A1, A2).

Subsequently, Airlift made a settlement with Evans and re-employed him. Evans dismissed his case against Airlift pursuant to Georgia Code § 81A-141a (R. p. 154). Consequently, Airlift withdrew from the appeal of the case (R. p. 152) and there remained and presently remain only Evans' damage claims against ALEA.

In deciding the appeal (App. B), the Supreme Court of Georgia relied on the case of *Brady* v. *Trans World Airlines, Inc.*, 401 F.2d 87, *cert. denied, International Association of Machinists* v. *Brady*, 393 U.S. 1048 (1969), distinguishing between a situation such as *Andrews* v. *Louisville and Nashville Railway Co.*, 406 U.S. 320, where, in a dispute between an employer and employee, the Court required exhaustion of administrative remedies, and a dispute such as *Brady, supra*, where the dispute was between the employee and his union, the Supreme Court of Georgia determinating in the latter instance that the doctrine of exhaustion of administrative relief was inapplicable. Apparently, the Supreme Court of Georgia overlooked in the *Brady* case, *supra*, the *requirement of exhaustion of administrative relief in a claim by an employee for damages against his union.*

ARGUMENT.

The complete collective bargaining agreement under which Evans seeks to base his case is attached to the motions to dismiss (R. p. 99). Evans was given a copy of the agreement in August, 1974, and was aware of its provisions (R. p. 65).

Pertinent provisions follow:

> "THIS AGREEMENT is made and entered into in accordance with the provisions of the Railway Labor Act, as amended, by and between AIR LIFT INTERNATIONAL, INC. (hereinafter known as the 'Company') and the CLERICAL OFFICE, AND STATION EMPLOYEES in the service of AIRLIFT INTERNATIONAL, INC. as represented by the AIR LINE EMPLOYEES ASSOCIATION, INTERNATIONAL (hereinafter known as the 'Union').

WITNESSETH:

It is hereby mutually agreed:

SECTION 1—RECOGNITION

(a) The Company hereby recognized the Air Line Employees Association as the duly designated and authorized representative of the Clerical, Office, and Station Employees in the employ of the Company for the purpose of the Railway Labor Act, as amended, in accordance with the certification issued by the National Mediation Board on July 30, 1959, in Case No. R-3364. (R. p. 101.)

* * * * *

SECTION 23—UNION SECURITY

(a) (1) All employees covered by this Agreement must become and remain members of the Union as a condition to their continued employment. Good standing shall be attained if he tenders the initiation fee and periodic dues uniformly required as a condition of membership by the union. Any employee not presently a member of the Union shall comply herewith within sixty (60) days or be discharged hereunder.

(2) All new employees of the Company shall become members of the Union sixty (60) days after date of employment with the Company and shall thereafter maintain membership in the Union as provided for in Paragraph (a)(1) of this Section.

(b) If a member becomes delinquent in the payment of initiation fee and/or membership dues, such member shall be notified by certified mail, return receipt requested, copy to the Vice President—Scheduled Air Freight of the Company, that he is delinquent in the payment of initiation fee and/or dues as specified herein and is subject to discharge as an employee of the Company. Such letter shall also notify the em-

ployee that he must remit the required payment within a period of fifteen (15) days or be discharged.

(c) If upon the expiration of the fifteen day period the employee still remains delinquent, the Union shall certify in writing to the Vice President—Scheduled Air Freight of the Company, copy to the employee, that the employee has failed to remit payment within the grace period allowed and is therefore to be discharged. The Vice President—Scheduled Air Freight shall then take proper steps to discharge such employee from the service of the Company.

(d) A grievance by an employee who is to be discharged as the result of an interpretation or application of the provisions of the Agreement shall be subject to the following procedure:

(1) An employee who believes that the provisions of this Section pertaining to him have not been properly interpreted or applied may submit his request for review in writing within five (5) days from the date of his notification by the Vice President—Scheduled Air Freight as provided in Paragraph (c). The request must be submitted to the Vice President—Scheduled Air Freight or his designee, who will review the grievance and render his decision in writing not later than five (5) days following the receipt of the grievance.

(2) The Vice President—Scheduled Air Freight, or his designee, will forward his decision to the employee, with a copy to the Union Headquarters. If the decision is not satisfactory to both the employee and the Union, then either may appeal the grievance within ten (10) days from the date of the decision directly *to a neutral referee agreed to by the Company and the Union. In the event the parties fail to agree on a neutral within the specified period, the neutral shall be appointed under the provisions of Section Seven, First A, of the Railroad Labor Act. The decision of the neutral referee shall be final and binding.*

(3) During the period a grievance is being handled under the provisions of this Section, and *until final*

award by the neutral referee, the employee shall not be discharged from the Company nor lose any seniority rights because of non-compliance with the terms and provisions of this Section.

(e) An employee discharged by the Company under the provisions of this Section shall be deemed to have been 'discharged for cause' within the meaning of the terms and provisions of this Agreement.

(f) It is agreed that the Company shall not be liable for any time or wage claims for an employee discharged by the Company pursuant to a written order by an authorized Union representative under the terms of this Section.

(g) The Company shall provide the Union Headquarters each month with a list of all resignations, transfers, new hires, leaves of absence, etc.

(h) The Union has the responsibility to properly advise new employee of Union membership requirements. [R. pp. 126-127; Emphasis added.]

* * * * *

SECTION 26—DURATION OF AGREEMENT

This Agreement shall become effective on the date of signing, December 13, 1973 except as specifically otherwise stated, and shall amend the Agreement dated July 1, 1971 and shall continue in full force and effect until July 1, 1975. The Agreement shall renew itself thereafter each July 1 unless written notice of intended change is served in accordance with Section 6, Title I of the Railway Labor Act, as amended, by either party thereto at least sixty (60) days prior to July 1 of any year. [R. p. 129]"

Special note should be made that the procedure provided for employees with complaints relative to violations of Section 23 is different from the procedure involving a grievance in the traditional labor-management sense (See Section 19, R. pp. 122-124, of the bargaining agreement). The procedure under Section 23 allows appeal to begin at the Vice Presidential level and proceed directly to a neutral arbitrator and maintains the

employee in his job during the process. This is the procedure which Evans seeks to bypass.

Attention is called to the Letter of Agreement attached to the collective bargaining agreement which "in compliance with Section 204, Title II, of the Railway Labor Act, as amended, . . . establish(s) a System Board of Adjustment for the purpose of adjusting and deciding disputes which may arise under the terms of the . . . Agreement". (R. pp. 132-135.)

Simply stated, Section 23, the "union security" clause of the collective bargaining agreement, requires membership in the Union as a condition of continued employment. Evans does not challenge the validity or legality of the clause itself and that is not a matter in controversy.[1] It is also not disputed that Airlift is a "carrier by air" and employer; that ALEA is the designated and certified bargaining representative of the unit concerned; and that Evans was, until his termination, an "employee" in that bargaining unit; all within the meaning of the Railway Labor Act. It follows that the employment relationship in issue is governed by the Railway Labor Act and the collective bargaining agreement.[2] This fact is admitted on the face of the Amended Complaint (Paragraphs 7, 10, 19, R. pp. 76, 77, 79).

Within the context of the above, the operative facts are quite basic. Upon Evans' initial hire he was informed of the "union

1. Section 2, Eleventh, of the Railway Labor Act expressly authorizes "union shop" agreements for employers and employees covered by that Act. This authority is effective even in "right-to-work" states. *Railway Employees Department* v. *Hanson*, 351 U.S. 225 (1956).

2. It should be noted that the Railway Labor Act requires the parties to "exert every reasonable effort to make and maintain agreements." As a part of this duty there must be set up adjustment procedures for the settlement of disputes arising thereunder. Such an agreement made pursuant to the Railway Labor Act has "the imprimatur of federal law upon it"; in matters arising under such an agreement the federal law is controlling. *Railway Employees Department* v. *Hanson*, 351 U.S. 225 (1956); *Machinists* v. *Central Airlines*, 372 U.S. 682 (1963).

security" requirement in the collective bargaining agreement. He met the Union "chairman" or shop steward shortly thereafter and took steps to join ALEA. Although he signed a dues "checkoff" authorization he did not pay his initiation fee, it not being payable until an employee completes his probationary period with the Carrier.

Following the completion of that probationary period, however, ALEA still had not received the initiation fee which is required for full membership. The Union made a series of inquiries concerning this failure to pay the required fee and finally demanded payment within fifteen days, warning Evans that he was subject to discharge for delinquency. The Union did not receive the initiation fee and in due course called upon Airlift to terminate the employment of Evans for non-compliance with the union security clause.

Upon receipt of the Union's request and pursuant to the existing collective bargaining agreement, Airlift discharged Evans for non-compliance with the union security clause. It is significant that the *only true issue of fact* in this case is raised by Evans' claim that he did pay the initiation fee.

It is also very noteworthy that in accordance with the Railway Labor Act, the collective bargaining agreement contains an *adjustment procedure specifically designed to resolve dispute discharges under the union security clause*. An employee who believes the provisions have not been properly applied may refer the matter to a *neutral arbitrator* for determination of the dispute. Pending resolution of the matter, the employee remains employed with no loss of seniority rights (see Section 23(d)(2)(3)).

Evans, however, did not avail himself of these procedures. Although the law as set forth hereinafter clearly requires that he pursue this administrative avenue of redress prior to bringing suit, he ignored these procedures and commenced this litigation alleging, generally, a wrongful discharge and a conspiracy to wrongfully discharge.

The Railway Labor Act, 45 U.S.C. § 151, et seq., which governs the labor relations between the parties to this suit, is a unique piece of labor legislation. Its singularity arises from its success in maintaining industrial peace in the railroad and airline industries. This is chiefly owing to the Act's mandatory dispute settlement procedures.

Two of the Act's stated purposes are (1) to avoid any interruption to commerce or to the operation of any carrier engaged therein, and (2) to provide for the prompt and orderly settlement of *all disputes* growing out of grievances or out of the interpretation or *application of agreements* covering rates of pay, rules or working conditions.

More specifically, Section 2, First, provides:

> *"It shall be the duty* of all *carriers* . . . and *employees* to exert every reasonable effort to make and maintain agreements concerning rates or pay, rules, and working conditions, and *to settle all disputes, whether arising out of the application of such agreements or otherwise* . . ." (45 U.S.C. § 152; emphasis supplied.)

Thus, it is the statutory "duty" of all carriers and their employees "to settle all disputes." That does not mean some disputes; it means *all* disputes "growing out of the application of such agreements or otherwise."

In furtherance of that general duty and specifically with reference to air carriers, Title II, Section 204, of the Act provides that ". . . it shall be the duty of every carrier and its employees, acting through their representatives, . . . to establish a board of adjustment. . ."

The purpose of that adjustment board is to settle:

> ". . . *disputes* between an employee or group of employees and a carrier . . . *growing out of* grievances, or out of the interpretation or *application of agreements* concerning rates pay, rules, or working conditions . . ." (45 U.S.C. § 184; emphasis suppled.)

Failing to reach a settlement in conference between the parties, such disputes may be referred by petition of the parties or by *either* party to the adjustment board.

It is now well settled that pursuit of this administrative remedy is not based on an election nor is it at the option of the parties —it is a *compulsory administrative procedure*. The Act requires that the adjustment procedure be set up, and it further requires that it be used to settle all disputes. *Machinists* v. *Central Airlines*, 372 U.S.C. 682 (1963).

This requirement of pursuit of the administrative remedy under the Railway Labor Act prior to seeking judicial redress has long been recognized. See, for example, *Sampsell* v. *Baltimore and Ohio R. R. Co.*, 235 F.2d 569 (4th Cir., 1956); *Alabaugh* v. *Baltimore and Ohio R. R. Co.*, 222 F.2d 861 (4th Cir., 1955). Both cases involved the discharge of an employee for failure to pay union dues. See also, *Johns* v. *Baltimore and Ohio R. R. Co.*, 118 F. Supp. 317 (N.D. Ill., 3 judge court, 1954); and *Cook* v. *Brotherhood of Sleeping Car Porters*, 309 S.W.2d 579 (Mo., 1958).

There existed *in the past*, however, a narrow exception to the exhaustion requirement. See *Moore* v. *Illinois Central R. R. Co.*, 312 U.S. 630 (1941). Under that exception an employee could treat an adverse employment decision as a final discharge, forego his administrative remedies, and institute a court action for breach of contract.[3]

In 1972, however, in *Andrews* v. *Louisville and Nashville Railway Co.*, 406 U.S. 320, the Supreme Court closed the *Moore* exception to the administrative exhaustion requirement. In that case, which interestingly enough was also commenced in the Fulton County (Georgia) Superior Court, a railroad

3. Parenthetically, it should be noted that in addition to damages, Evans requested reinstatement and back pay. (See the Prayer of the Amended Complaint.) This is, of course, inconsistent with acceptance of the discharge as final and such relief would not have been available in a court action under the *Moore* case, even if it still was good law.

employee was injured in an auto accident and incapacitated for a period of time. He later claimed complete recovery and requested to be put back to work. The carrier refused, stating that the employee had not fully recovered. The employee elected to treat that refusal as a discharge and sued for damages without pursuing his remedy before the adjustment board. The Federal District Court to which the case had been removed dismissed the complaint for failure to exhaust administrative remedies; the Fifth Circuit and the Supreme Court affirmed the dismissal. Speaking for an almost unanimous Court in that case, Justice Rehnquist noted that the prior exception to the exhaustion requirement had been based on an erroneous conclusion that the Railway Labor Act's dispute adjustment procedures had been intended as optional, not compulsory. This was in fact not the Congressional intent:

> ". . . the notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is not longer good law." 406 U.S. at p. 322.

The Court went on to hold:

> "The term 'exhaustion of administrative remedies' *in its broader sense* may be an entirely appropriate description of the obligation of both the employee and carrier under the Railway Labor Act to resort to dispute settlement procedures provided by that Act." 406 U.S. at p. 325; Emphasis supplied.

In fact, the Court stated, the obligation may be even broader than mere "exhaustion"; except in those cases where the adjustment board's procedures and proceedings are judicially reviewed for due process and like matters, the administrative remedy is "exclusive".

> "It is clear, however, that in at least some situations the Act makes the federal administrative remedy exclusive, rather than merely requiring exhaustion of remedies in one forum before resorting to another. A party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding. . . . he is limited to the judicial review of the Board's proceedings that the Act itself provides." 406 U.S. at p. 325.

Thus, the *Andrews* case has firmly and unequivocally established that the Railway Labor Act's dispute settlement procedures are mandatory, not optional, and that an employee who has a dispute with a carrier arising out of the interpretation or application of a collective bargaining agreement *must resort to those administrative procedures* for his remedy. Because Andrews had not availed himself of those procedures, just as Evans has not in this case, the Supreme Court affirmed the dismissal of his complaint.

Since *Andrews,* this requirement has been applied by other courts. In *Haney* v. *Chesapeake and Ohio R. R. Co.,* 498 F.2d 987 (D.C. Cir., 1974), a former employee sued the railroad for separation pay allegedly due under a collective bargaining agreement. The dismissal of her complaint was affirmed based on the failure to exhaust her administrative remedies. In so holding, the Court commented on the *Andrews* decision:

> "A decision like Andrews involving a matter that has been considered and reconsidered in light of reflection over the years, is not to be accorded a niggardly construction. Sound principles of judicial administration conjoined with the salient considerations discussed in that case make it appropriate to require appellant to pursue her grievance adjustment remedies. . . ." 498 F.2d at p. 992.

For similar applications of the exhaustion principal under the Railway Labor Act see: *Rinker* v. *Penn Central Transportation Co.,* 350 F. Supp. 217 (E.D. Penn., 1972); *West* v. *American Airlines,* 352 F. Supp. 1278 (N.D. Ill., 1972); *Merinuk* v. *Baker,* 366 F. Supp. 735 (E.D. Penn., 1972). *Ballie* v. *Rollins and Burlington Northern, Inc.,* 530 P.2d 440 (Sup. Ct. Mont., 1974).

In light of the unequivocal holding of the *Andrews* case, it should be noted that during oral argument on the Motions, the Plaintiff advanced several arguments designed to obscure the plain requirements of the Railway Labor Act as enunciated in *Andrews*. Chief among these arguments were: (1) *Andrews* and the adjustment procedures do not apply because this is not a dispute arising out of the collective bargaining agreement concerning rates of pay, rules or working conditions; and (2) it would be unjust and "absurd" to refer the Plaintiff for his redress back to the parties who allegedly committed the wrong.[5]

As to the first of these arguments the *Andrews* court addressed a similar proposition when confronted with a state law breach of employment contract theory rather than a violation of the collective bargaining agreement. There the Court stated in part:

> "The fact that petitioner characterizes his claim as one for 'wrongful discharge' does not save it from the Act's mandatory provisions for the processing of grievances. . . . the very concept of 'wrongful discharge' implies some sort of statutory or contractual standard that modifies the traditional common-law rule that a contract of employment is terminable by either party at will. . . ." 406 U.S. at pp. 324, 325.

Noting that the only source of Andrews' right not to be discharged was the collective bargaining agreement, the Court reasoned that the extent of the obligations to return him to work necessarily depended upon an interpretation of that agreement. The claim was therefore subject to the Act's adjustment procedure.

In a like manner, the present case also arises out of the collective bargaining agreement. But for the agreement there would

5. In oral argument the Plaintiff placed an inordinate emphasis on the dicta in *Brady* v. *Trans World Airlines*, 401 F.2d 87 (3rd Cir., 1968). Two main factors make that case inapposite to the present considerations: (1) it preceded *Andrews* by some four years and (2) most significantly, the claimant in that case *had pursued his administrative remedies* prior to turning to the judicial system. Evans has not even attempted to utilize those procedures.

have been no requirement that Evans join the Union as a condition of continued employment; but for the agreement there would have been no requirement that the Carrier discharge him for failure to maintain Union membership; and, like in *Andrews*, but for the agreement the discharge may not be characterized as "wrongful".

Furthermore, how can Evans claim this matter does not arise out of the collective bargaining agreement when on the fact of his Amended Complaint he charges that his termination was in violation of that agreement? (See paragraph 7 of the Amended Complaint)

The fact that Evans characterizes his claim as one for "wrongful discharge" or "conspiracy" or "failure to represent" cannot alter the nature of the crucial dispute in this case—*Evans claims he paid his initiation fee and ALEA claims he did not.* That is precisely and exactly the type of dispute that Congress intended to be decided in the administrative settlement procedures mandated by the Act.

Evans' second argument propounded in an effort to sidestep the requirements of the Railway Labor Act is that since his discharge was the result of action by both Airlift and ALEA it would be unjust to refer him to the adjustment procedure for redress. *This argument ignores, however, the impartial administrative procedures which the Act and the collective bargaining agreement specifically provide*. By the express terms of the contract an employee aggrieved under the "union security" clause may refer the matter directly to a *"neutral referee."* (Collective Bargaining Agreement, § 23 (d)(2); at R.p. 126,7.)

In addition, Evans' argument also chooses to ignore the judicial review available after he has at least attempted to pursue his administrative remedies.

This matter was addressed by the Court in *Alabaugh* v. *Baltimore and Ohio R. R. Co.*, 222 F.2d 861 (4th Cir., 1955), as follows:

> "The argument that the Adjustment Board might not furnish a fair tribunal in cases of this character because certain members might be biased and prejudiced because of union affiliations furnishes no reason why the courts may ignore the fact that Congress has vested it with exclusive primary jurisdiction in such cases." 222 F.2d at p. 867.

Following the *Andrews* decision, the Court in *Haney* v. *Chesapeake and Ohio R. R. Co.*, 498 F.2d 987 (D.C. Cir., 1974) answered a similar claim by a plaintiff seeking to by-pass the mandatory grievance procedure. There the Court stated:

> "In effect, appellant would have us carve out an exception to *Andrews* whenever an aggrieved employee's prosecution of his claim *runs the risk of making his union an adversary*. Although the concern expressed by appellant is plausible, we conclude that *relieving her of the exhaustion requirement would open too large a hole in Andrews, and that the sound course is to require her to seek relief before the administrative tribunal*, relying for further protection on the general doctrines of law permitting limited judicial surveillance in an action complaining of administrative abuse. . . . *Whether an adjustment board will give adequate consideration* to appellant's particular claim is *not an issue that should be prejudged* before that tribunal has had an opportunity to act." 498 F.2d at p. 992; emphasis supplied.

It is plain from the above that a claim of "probable prejudice" in the administrative process is not sufficient to overcome the exhaustion of remedies requirement of the Railway Labor Act. In so claiming Evans is not only ignoring the fact that he may refer the matter to a *neutral* arbitrator, but he is also asking the Court to speculate and prejudge that Congressionally mandated arbitration process without giving it an opportunity to perform its specific function.

Even after aggrieved employee has exhaused his administrative remedies, it is not to be *assumed*, as Evans has done, that an adjustment procedure is "inherently unfair" merely because it is set up (pursuant to the Railway Labor Act) in a contract

between the Union and the Carrier. *Wells* v. *Southern Airways, Inc.*, 517 F.2d 132 (5th Cir. 1975); *Giordano* v. *Modern Air Transport*, 504 F.2d 882 (5th Cir., 1974); *Rossi* v. *TWA*, 507 F.2d 404 (9th Cir. 1974). Certainly, if the fairness of the arbitration process may withstand an attack on the grounds of bias or partiality after an individual has given them a chance to operate, it would seem highly inappropriate to nullify those procedures as a matter of law and allow them to be bypassed on the *mere assertion* that the procedure will *possibly* be biased.

There is a final and most crucial factor herein to which the consideration of the court is respectfully directed. The Supreme Court of Georgia in its opinion clearly was influenced by the case of *Brady* v. *TWA*, *supra*, with regard to the holding therein that since a system board of adjustment does not have jurisdiction to hear an employee's suit against his union for breach of duty of fair representation there exists no bar to judicial review of the merits of such a controversy. The Supreme Court of Georgia interpreted this to mean that a claim by an employee against his union would not be subject to holding of Andrews, supra, requiring exhaustion of administrative remedies in a case between employer and employee.

It cannot be assumed even arguendo that such position is correct. For one thing, Brady is factually different:

> ". . . While recalcitrant in accepting the new scale he ultimately relented and made a tender of all past delinquencies prior to any demand by IAM upon TWA to discharge him."

This was not the case with respect to Evans.

Much more important, however, is the fact that the cast at bar no longer (and did not before the Supreme Court of Georgia) seeks reinstatement to employment. Evans is reemployed and here seeks only against ALEA actual and punitive damages.

After stating in the Brady case with respect to reinstatement:

> ". . . In part I above, it was held that the Board was without jurisdiction to entertain Mr. Brady's complaint which

was directed against both TWA and IAM. Under these circumstances, when procedures for *reinstatement* are otherwise unavailable to him, the purposes of the Railway Labor Act would best be served if an employee *seeking to regain his job* may invoke the equitable powers of the court. . . . Emphasis supplied.

The Court, with respect to the damage claim against Brady's union, stated as follows:

> It has been the general rule, and the rule of this circuit, that before a suit against a union for breach of its duty of fair representation may be brought in the courts, the member must first exhaust the available internal union remedies, or show an adequate reason for failing to do so. . . ."
>
> * * * * *
>
> ". . . Nevertheless, there is no obligation or evidence that he evoked any appellate union procedures to redress the asserted unfair and arbitrary action against him by the local and district officers. Nor does he advance an adequate reason for his failure to do so. . . ."
>
> * * * * *
>
> ". . . However, in this case, Mr. Brady's claim for such damages may not be sustained because of his failure to exhaust internal union remedies or to adequately explain that failure. . . ."

Nowhere in the case at bar, an action for damages for breach of duty of fair representation, does Evans allege that he exhausted *any* administrative remedies of any kind whatsoever, and he does not allege *any* adequate reason for failing to do so. Just as in the Brady case, Evans here is not entitled to recover on his damage claim and the same should have been dismissed on ALEA's motion.

CONCLUSION.

The Railway Labor Act and the collective bargaining agreement is clear in its mandate that disputes which arise from the application of collective bargaining agreements, such as the one

presently before this Court, are to be settled in the statutory adjustment processes specifically set up for that purpose. This principle has been reemphasized by the Supreme Court in its *Andrews* decision, and it is now beyond question that a plaintiff must exhaust his administrative remedies under that Act prior to seeeking judicial redress.

In spite of Evan's arguments that the exhaustion principle does not apply to his circumstances, his Amended Complaint sets forth a claim which *arises from the application of* a Railway Labor Act collective bargaining agreement; therefore his cause is presently in the wrong forum. The scheme of labor relations as contemplated by Congress in the railroad and airline industries requires that this case be dismissed *to the administrative processes specifically designed to resolve such disputes.*

Respectfully submitted,

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APPENDIX A.

IN THE SUPERIOR COURT OF FULTON COUNTY.

NELSON EVANS,

vs.

AIRLIFT INTERNATIONAL INC., AND AIR LINE EMPLOYEES ASSOCIATION INTERNATIONAL.

Civil Action
File No. C-841

ORDER.

The above defendants having brought before the Court Motions to dismiss the plaintiff complaint, and the Court having heard argument of counsel and citation of authorities, raising subject matter jurisdiction and exhaustion of remedies, the Court does hereby overrules and dismisses the said Motions of defendants to the plaintiffs complaint.

So ordered that 1st day of August.

JEPTHA C. TANKSLEY,
Judge, Superior Court, AJC.

APPENDIX B.

IN THE SUPREME COURT OF GEORGIA.

Decided: April 7, 1976

30610. AIR LINE EMPLOYEES ASSOCIATION INTERNATIONAL

vs.

EVANS (616)

GUNTER, Justice.

This is an interlocutory appeal, originally granted by this court on the application of two applicant-defendants, from a judgment that denied the defendants' motion to dismiss the plaintiff's complaint. After this court had granted the interlocutory appeal, one of the defendants, the employer of the plaintiff, voluntarily dismissed its appeal, and, at the same time, the plaintiff dismissed the employer as a party defendant in the trial court. The result of these two dismissals is that the issues for determination, as the appeal now stands, are between the plaintiff below, Evans, and the defendant below, the Union.

Since appellate jurisdiction was in this court when the interlocutory appeal was originally granted by this court, this court has retained jurisdiction even though the two dismissals referred to above have eliminated the equitable relief involved at the time the interlocutory appeal was granted. Our Constitution provides: "It shall be competent for the Supreme Court to require by certiorari or otherwise any case to be certified to the Supreme Court from the Court of Appeals for review and determination with the same power and authority as if the case had been

carried by writ of error to the Supreme Court." Ga. Code Ann. Sec. 2-3704.

Evans was an employee of the employer until November 19, 1974, when he was discharged by the employer at the direction of the Union for his alleged failure to pay his initiation fee to the Union.

On November 24, 1974, Evans filed his complaint against the employer and the Union seeking injunctive relief, compensatory damages, punitive damages, and attorneys' fees. Both defendants filed motions to dismiss the complaint for failure to state a claim on the ground that Evans had failed to exhaust his administrative remedies required by the Railway Labor Act, 45 U.S.C. Sec. 151 et seq., and the collective bargaining agreement between the employer and the Union.

The trial judge overruled both motions to dismiss, two interlocutory appeals followed, the employer was then dismissed as a party in the trial court, the employer dismissed its interlocutory appeal, and we now have for decision, as the sole remaining issue in the case, whether the Union's motion to dismiss the complaint was properly denied by the trial judge.

As we view the case in its present posture, the only issues for determination are between Evans and the Union. Evans contends that he was ejected from membership in the Union without cause, or that he was denied membership in the Union without cause, and that the Union, without cause, directed his discharge by his employer for non-compliance by Evans with the terms of the collective bargaining contract between the Union and the employer. The responsive pleadings of the Union denied that Evans had ever been a member of the Union, admitted that he had paid dues to the Union for the month of October, 1974, and admitted that his employment with the employer had been terminated at the direction and request of the Union.

We think this case is controlled by the principles enunciated in *Sheet Metal Workers International Association* v. *Carter*, 133 Ga. App. 872, 212 SE2d 645 (1975).

Also, see *Brady* v. *Trans World Airlines, Inc.*, 401 F.2d 87, *cert. denied, International Association of Machinists* v. *Brady*, 393 U.S. 1048 (1969). In that case an employee charged the Union with hostile discrimination in refusing to accept tender of the plaintiff's dues and in wrongfully having him discharged from employment with TWA. The complaint further charged the Union with discrimination and with misrepresenting the facts pertaining to the plaintiff's alleged dues delinquency in a hearing before a Railway Labor Act adjustment board. The Third Circuit construed such allegations as a complaint primarily against his bargaining agent rather than his employer. After setting forth statutory authority and discussing the jurisdiction of adjustment boards and of the courts, the Third Circuit stated: "The jurisdiction of railway carrier adjustment boards has been construed as encompassing disputes between employees and their employers, but not disputes between employees and their bargaining representatives." P. 92.

See also *Deboles* v. *Trans World Airlines, Inc.*, 350 F. Supp. 1274 (1972), where it was held that the complaint set forth a dispute primarily involving TWA employees and their Union representatives, and that the Railway Labor Act had not preempted jurisdiction from the state and federal courts.

We conclude in this case that the exhaustion of administrative remedies by Evans, as contended by the Union, was not required, and Evans' complaint was not subject to dismissal for failure to state a claim.

Judgment affirmed. All the Justices concur.